STATE OF CALIFORNIA
Arnold Schwarzenegger, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
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ANGELA BRADSTREET, STATE LABOR COMMISSIONER

ROBERT R. ROGINSON
Chief Counsel

March 23, 2009

Jonathon Siegel
Samantha N. Hoffman
Jackson Lewis, LLP
5000 Birch Street
Suite 5000
Newport Beach, California 92660

Re: Alternative Workweek Schedule During Summer Months

Dear Mr. Siegel and Ms. Hoffman:

This is in response to your letter dated March 24, 2008, requesting an opinion of this office concerning alternative workweek schedules. Specifically, an employer represented by your firm would like to adopt a schedule that would rotate between a schedule of four 9-hour days and one 4-hour day during the summer months and five 8-hour days during the rest of the year. In subsequent discussions with your office, you informed that the employer in question manufactures pharmaceutical products and that the proposed schedule would affect only one of its locations in California and apply only to those full workweeks within the specified months. As described more fully below, it is the opinion of this office that the pertinent Labor Code and Industrial Welfare Commission wage order provisions do not prohibit the employer described in your letter from implementing the proposed alternative workweek schedule.

The employer identified in your letter must comply with Labor Code § 511 and the procedures set forth in Section 3 of Wage Order 1-2001 in adopting an alternative workweek schedule. Labor Code § 511(a) provides that the employees of an employer may adopt a "regularly scheduled alternative workweek schedule that authorizes work by the affected employees for no longer than 10 hours per day with a 40-hour workweek without the payment of overtime to the affected employees." Labor Code § 500(c) defines "alternative workweek schedule" to mean "any regularly scheduled workweek requiring an employee to work more than eight hours in a 24-hour period." Labor Code § 500(b) defines "workweek" to mean "any seven consecutive days, starting with the same calendar day each week. 'Workweek' is a fixed and regularly recurring period of 168 hours, seven consecutive 24-hour periods." Section 3(C)(1) of Wage Order 1-2001 further provides that the proposed agreement must designate a regularly scheduled alternative workweek in which the specific number of work days and work hours are regularly recurring. In doing so, the employer may propose a single work schedule that would become the standard schedule for workers in the work unit, or a menu of work schedule options, from which each employee in the unit would be entitled to choose.

Under the facts presented, your client's proposed alternative workweek schedule meets the requirements for an alternative workweek schedule under Labor Code § 511 and Wage Order 1-2001. Specifically, it proposes a single, regular schedule that will occur each year only for a specified and temporary period of time, namely for the full workweeks within the summer months of June through September. During the remaining weeks and months of the year, the employees will continue to operate on a standard five-day workweek for eight hours a day. The alternative workweek schedule is regularly recurring because for each full workweek during the four identified summer months, the affected employees will work four 9-hour days and one 4-hour day. This also complies with the requirement in Section 3(B)(1) of Wage Order 1-2001, which requires that any alternative workweek schedule adopted must provide for not less than four hours of work in any shift. Lastly, the proposed alternative workweek schedule would apply only to the full workweeks during those summer months.

Neither Labor Code § 511 nor Section 3 of Wage Order 1-2001 requires that an alternative workweek schedule be implemented for each workweek of the year, and we decline to impose such restrictions on the schedule proposed here. Rather, what is required is that the schedule be regularly recurring. This is established under the facts presented here where the schedule is determined in advance, fixed, and employees are capable of being provided notice as required in the wage order about the days and times during which they will be required to work under the alternative workweek schedule. As stated by the Industrial Welfare Commission in its Statement as to the Basis:

> [t]he phrase "regularly scheduled," as set forth in Labor Code § 511(a), means that the employer must schedule the actual work days and the starting and ending time of the shift in advance, providing the employees with reasonable notice of any changes, wherein said changes, if occasional, shall not result in a loss of the overtime exemption. However, in no event does Labor Code § 511(a) authorize an employer to create a system of "on-call" employment in which the days and hours of work are subject to continual changes, depriving employees of a predictable work schedule.

The proposed alternative workweek schedule is not a system of "on-call" employment, but rather is stable, predictable and not subject to continual changes. The employer, of course, must comply fully with the procedures set forth in Section 3(C) of Wage Order 1-2001, including, among other things, the notice and meeting procedures set forth in Section 3(C)(3). The employer must also comply fully with the accommodation obligations set forth in Labor Code § 511(d) and Section 3(B)(5)-(6) of Wage Order 1-2001, and under Labor Code § 511(c), the employer may not reduce an employee's regular rate of hourly pay as a result of the adoption of the schedule. It is also the opinion of this office that to the extent that the proposed alternative workweek schedule remains the same each year, i.e. a schedule of four 9-hour days and one 4-hour day during the full workweeks in the summer months, and is presented to the employees for adoption as such in the procedures set forth in Section 3(C)(3) of Wage Order 1-2001, it is not necessary to conduct further elections each year.

This opinion is based exclusively on the facts and circumstances described in your request and is given based upon your representations, express or implied, that you have provided a full and fair description of all facts and circumstances that would be pertinent to our consideration of the questions presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Division of Labor Standards Enforcement.

I hope that the above sufficiently responds to your request and I thank you for your interest in compliance with California wage and hour laws.

Very truly yours,

Robert R. Roginson
Chief Counsel

RRR:

Cc: Labor Commissioner Angela Bradstreet

2009.03.23